Nadler Statement on the Defense of Marriage Act

Monday, 29 March 2004

Washington, DC -- Congressman Jerrold Nadler (D-NY), Ranking Democrat on the House Judiciary Subcommittee on the Constitution, today made the following statement at a hearing on the Defense of Marriage Act:

Today we begin the first of five hearings on the question of marriage equality, and how to stop it. When I first joined this Subcommittee it was called the Subcommittee on Civil and Constitutional Rights. These days, our work is more focused on the extermination of rights than on their protection or expansion.

I understand that some of my colleagues view even the remote possibility of same-sex marriage with great trepidation, and that those concerns are shared by some of their constituents.

It is also true, however, that no state currently recognizes same-sex marriages. While some municipal officials have performed marriages, and challenges to state laws are moving forward, that remains the law today. The state of Massachusetts will soon become the first state to permit full marriage equality. Just yesterday, the Massachusetts legislature gave approval to a state constitutional amendment that would ban marriage, but provide for civil unions. How that process continues will be up to the people of that state.

Despite our disagreements over the many issues relating to marriage equality, I do want to commend our Chairman, and the Chairman of this Subcommittee, for standing up to what I know must be great pressure to move forward in a hurried manner. This will be the first of five hearings to examine the legal issues raised in the marriage debate, including constitutional amendments and other proposals.

Whatever your views on this issue, amending the constitution is a tremendous responsibility, one that has been entrusted to our committee. That we should treat it seriously is appropriate. Even the proponents of a constitutional amendment do not agree on what an amendment should say. Even opponents of marriage equality, including Chairman Sensenbrenner, and some of our witnesses today, are skeptical of a rush to amend the constitution. We will have plenty over which to disagree, but on this note of caution, I believe we are in agreement.

I would like to take issue with the notion that marriage needs to be defended from lesbian and gay families. There are many threats to marriage these days, and half of all marriages end in divorce, but heterosexuals have long succeeded in failing at marriage without any help from lesbian and gay couples. I really cannot see how people who consider themselves "pro-marriage" could be so gung-ho about denying so basic a right to so many stable, law abiding, tax paying, loving families.

So today we will discuss the question whether the "Defense of Marriage Act" is legally sufficient to "protect" marriage, or whether the Full Faith and Credit Clause of the constitution allows states to refuse to recognize same-sex marriages from other states on public policy grounds. I find it interesting how many people who, just a few short years ago supported the Defense of Marriage Act, are now urging Congress to amend the constitution. Is this, I wonder, a tacit admission on their part that they never believed DOMA was constitutional? That would seem to be the implication of today’s argument.

It will be, I am sure, an interesting scholastic debate, but that is all it will be. Whatever arguments are made today may be informative, but they won’t answer the question. We won’t know the answer until the courts decide the question, and that won’t be for some time.

I would hope that my colleagues are not really going to suggest that we amend the constitution based on the results of a high-level moot court competition. It is, after all, little more than speculation.

I would also hope that my colleagues remember that we are a nation of laws, and that the rule of law includes a healthy respect for the separation of powers. That includes the rulings of the independent judiciary, even when you disagree with its rulings. This constant drumbeat against the rule of law, of deligitimizing our legal institutions, is dangerous to a democracy. Protecting the rights of unpopular minorities is the core purpose of our bill of rights and its enforcement by the independent judiciary.

As Justice Jackson famously observed in West Virginia Board of Education v. Barnette,

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Today, those fundamentally American words are nearly forgotten. Constitutional rulings of the courts are evaluated by looking to polling numbers. People no longer agree with the courts, they attack the legitimacy of our system of government. That is dangerous. Whatever temporary advantage it may produce, on an issue or in an election, such rhetoric threatens the very underpinnings of our free society.

With that, I thank the Chairman, and I yield back the balance of my time.

###